

LAW OFFICES

COHN AND MARKS LLP

**SUITE 300
1920 N STREET N.W.
WASHINGTON, D.C. 20036-1622**

ROBERT B. JACOBI
ROY R. RUSSO
RONALD A. SIEGEL
LAWRENCE N. COHN
RICHARD A. HELMICK
J. BRIAN DE BOICE
JEROLD L. JACOBS
JOSEPH M. DI SCIPIO
KEVIN M. GOLDBERG
SUSAN V. SACHS

TELEPHONE (202) 293-3860

FACSIMILE (202) 293-4827

HOME PAGE WWW.COHNMARKS.COM

OF COUNSEL
MARCUS COHN (1913-2001)
LEONARD H. MARKS
RICHARD M. SCHMIDT, JR.
JOEL H. LEVY

DIRECT DIAL: (202) 452-4817

EMAIL ADDRESS: LNC@cohnmarks.com

January 4, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 - 12th Street, S.W.
Room TW-A325
Washington, DC 20554

RECEIVED

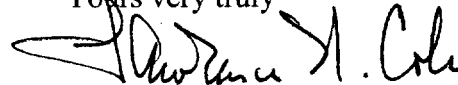
JAN - 4 2005

Federal Communications Commission
Office of Secretary

Dear Ms. Dortch

On behalf of Tichenor License Corporation, there are herewith submitted an original and four (4) copies of its Opposition to Application for Review in MM Docket No. 02-212 (Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Vinton, Louisiana, Crystal Beach, Lumberton, and Winnie, Texas)).

Yours very truly


Lawrence N. Cohn

No. of Copies rec'd
List ABCDE

014

ORIGINAL

BEFORE THE
Federal Communications Commission

In the matter of

Amendment of Section 73.202(b))	MB Docket No. 02-212
FM Table of Allotments,)	RM-10516
FM Broadcast Stations,)	RM-10618
(Vinton, Louisiana, Crystal Beach,)	
Lumberton, and Winnie, Texas))	

RECEIVED

JAN - 4 2005

To: The Commission

Federal Communications Commission
Office of Secretary

Opposition to Application for Review

Tichenor License Corporation ("Tichenor"), licensee of Station KLTO (recently changed to KPTI), Crystal Beach, Texas¹, and Station KOBT(FM) (recently changed to KKHT-FM), Winnie, Texas, by its counsel, pursuant to 47 C.F.R. Section 1.115(d) of the Commission's rules, hereby submits this Opposition to the Application for Review ("Application") filed by Charles Crawford ("Crawford") on December 20, 2004, with regard to the Media Bureau's Memorandum Opinion and Order, DA 04-3616 (released November 26, 2004) ("Order") in the above-referenced proceeding. TLC opposes the Application, and in support of its position states as follows.

In the Order, the Media Bureau denied the FM rule making proposal advanced by Crawford—i.e., to allot Channel 287A to Vinton, Louisiana, and instead granted the counterproposal advanced by Tichenor—i.e., (1) to upgrade Channel 287A at Crystal Beach, Texas (used by Tichenor's Station KLTO) to Channel 287C2, and to reallocate Channel 287C2 from

¹ For purposes of simplicity, the Tichenor stations involved in this proceeding are referred to by their prior call signs.

Crystal Beach Winnie, Texas, and (2) to reallocate Channel 264C (used by Tichenor's Station KOBT) from Winnie, Texas, to Lumberton, Texas, as its first local aural service. Notwithstanding the obvious superiority of Tichenor's counterproposal to Crawford's proposal under the "first local service" criterion set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1988) ("FM Revision"), Crawford contends that TLC's proposal should be rejected on the ground that TLC's proposal to provide a first local service to Lumberton should not be credited.

In his Application, Crawford presents two major arguments. First (in Section II and Section III²), Crawford vigorously attacks the legal validity of the Commission's "Tuck" test (established in Fay and Richard Tuck, 3 FCC Rcd 5374 (1988) (hereafter "Tuck")) for determining whether a proposed community of license should be considered "independent" (and not merely a part of a larger metropolitan area), and therefore allowing the petitioner to claim credit for proposing a "first local service" under FM Revisions. Second (in Section IV and, implicitly, Section I), Crawford attacks the bona fides of Tichenor's proposal for Lumberton. We address these arguments below.³

I. The Commission Should Reject Crawford's Attack on the "Tuck" Test.

In Tuck, the Commission reexamined its "Huntington Doctrine" (Huntington Broadcasting Co. v. FCC, 192 F.2d 33, 35 (D. C. Cir 1951)), and stated that in making decisions regarding whether, for Section 307(b) purposes, a smaller community was "independent" of a

² The Order incorrectly states (Paragraph 1) that Tichenor filed a "Motion for Leave to File Study of Tuck Decisions" and a "Study of Reported Decisions by FCC Applying the Tuck Precedent to Determine Whether to Grant or Deny a First Local Service Status." These pleadings were filed by Crawford and were opposed by Tichenor.

³ We will not address Sections V and VI of Crawford's Application as they add nothing to Crawford's real arguments and are worthy neither of a response by Tichenor nor consideration by the Commission in the present context.

larger metropolitan of which it was a part, the Commission would consider, among other factors, eight specific characteristics “most likely to reflect” whether the proposed allotment community was “independent” or “interdependent” of the larger market. Tuck, 3 FCC Rcd 5374, 5378. According to Crawford, the standard established by the Commission in Tuck is “subjective and capricious” and violates the “arbitrary and capricious” standard of the Administrative Procedure Act. Moreover, in Crawford’s view, the Tuck test does not include what he considers to be the “key consideration” in such matters, to wit: whether there is a “reasonable likelihood that a broadcast station with a signal serving the central city or metropolitan area will in truth serve as a meaningful local outlet for a designated licensed community.” Application, page 10.

In the instant case, the Media Bureau applied the Tuck test with regards to TLC’s proposal to change the community of license of Station KOBT from Winnie to Lumberton, and concluded that Lumberton (which is part of the larger Beaumont, Texas market) is an independent community. Order, Paragraph 4. The Media Bureau compared TLC’s proposal to bring a first local service to Lumberton (population 8,731) against Crawford’s proposal for Vinton (population 3,338), and reached the inescapable conclusion that TLC’s proposal was superior to Crawford’s proposal because Lumberton’s population exceeds Vinton’s population.

The Commission should reject Crawford’s attack on the Tuck test in the context of this proceeding for three distinct reasons. The first reason is that notwithstanding the vehemence of Crawford’s attack on the Commission’s Tuck test, nowhere in his Application or in any other papers which he has filed in this proceeding has Crawford ever disputed the conclusion which the Media Bureau reached under the Tuck test—namely, that Lumberton is an independent community for FM allotment purposes, much less has he ever provided the slightest information to establish that the Media Bureau’s conclusion is wrong. As Crawford does not dispute that

Lumberton is an independent community, his attack on the Commission's Tuck test, per se, is completely beside the point in the context of this proceeding. For this reason, the Commission should not address the merits of Crawford's argument regarding the validity of the Tuck test.

Nevertheless, if the Commission were to address Crawford's attack on the Tuck test, it should reject the attack. Crawford claims that the "factors under the Tuck policy...are so nebulous and subjective as to be arbitrary and capricious under the Administrative Procedure Act" (Application, page 3), and that the "Tuck policy is a menu of wildly subjective criteria" (Application, pages 8-9). The plain fact is that most of the eight criteria specified in the Tuck test are really quite specific (e.g., whether the smaller community has its own newspaper or other media that covers the communities local needs and interests; whether the smaller community has its own telephone book provided by the telephone company or zip code; whether the community has its own commercial establishments, health facilities and transportation system; etc.), and yet it is flexible enough to allow the Commission to consider significant factors which are reasonably related to the determination to be made—i.e., whether the identified and proposed community is an "independent" community, and not merely an "area" within a recognized community, having no distinct identity of its own.

Another aspect of Crawford's complaint that the Tuck standard is "nebulous and subjective" focuses on the fact that the Commission has not announced some kind of weighting system to assess the factors which have been identified as being relevant in the ultimate conclusion that a specified community is or is not "independent." Application, pages 14-16. Apparently, Crawford believes the Commission is required to announce, for example, that Tuck test Factor #1 is considered with a relative weight of X, while Factor #2 is considered with a relative weight of Y, etc., and that a rule making petitioner must accumulate some number of

weighting units for the proposal to be accepted. Tichenor disagrees. There is no requirement that the Commission announce such a weighting system to be used in all cases; moreover, it would be unwise and unreasonable for the Commission to have such a rigid system because even in situations where petitioners' showings on one of the factors was convincing, in some cases the showing would be stronger than in other cases, and the Commission should be allowed to take these differences into account in reaching its ultimate conclusions under Tuck.⁴ In addition, the Commission has emphasized that the list of factors specified in Tuck is not all inclusive, and a pre-announced weighting system would not provide the flexibility needed to allow consideration of other relevant factors.

Finally, Crawford asserts that the Tuck test fails to take into account the "most crucial consideration"—i.e., whether there is a "reasonable likelihood that a broadcast station with a signal serving the central city or metropolitan area will in truth serve as a meaningful local outlet for a designated licensed community." Application, page 10. Of course, Crawford's not-so-subtle implication is that all FM rule making petitioners who propose to serve a smaller community within a larger metro area (including Tichenor) are simply not to be believed. Apart from the insulting and outrageous nature of Crawford's accusation, it is surely more than a little ironic that Crawford, who claims that the Commission's current Tuck test is so "nebulous and subjective" as to amount to being "arbitrary and capricious," simultaneously contends that the Commission should make FM allotment decisions based on whether it finds that there is a "reasonable likelihood" that the proposed station would be a "meaningful local outlet," when

⁴ In Section III of the Application, Crawford contends at length that his research shows that over the period September 1995 to August 2004, the Commission has generally acted favorably regarding claims of community independence made by petitioners under the Tuck test. To Crawford, this shows that the Commission's Tuck test is biased in favor of rulemaking proponents. Even if the premise of Crawford's argument is correct, this hardly shows Commission bias. Rather, it shows that petitioners (typically with the assistance of communications counsel) use good sense and do not file petitions involving Tuck showings without doing their homework in advance, and only file petitions which have a strong likelihood of success on the merits.

such determination would inevitably be based heavily on an assessment of the “meaningfulness” of the station’s future programming to the licensed community, and as the station’s license might be assigned from one party to another over an undefined period of time. Aside from the obvious vagueness of the terms “reasonable likelihood” and “meaningful” (which truly are “nebulous and subjective” terms), it would be absurd for the Commission to even attempt to look into the future and make allotment decisions based on obviously unknowable factors.

And even assuming the Commission wanted to engage in such an obviously impossible effort, it is extremely unlikely that such determinations could be made in the context of the paper proceedings as now established in 47 C.F.R. Section 1.420 of the rules. Crawford’s proposal would presumably require the Commission to completely revamp its procedures and provide for some kind of hearing procedure in which a rule making proponent would present evidence in support of its proposal to “serve” a specified community of license, which would consist not only of information regarding the community and its independence of other large nearby communities (as currently required under the Tuck test), but a proffer regarding the petitioner’s “proposed programming” designed to meet the needs, interests, etc. of the residents of the specified proposed community of license. Presumably, other parties to the proceeding would have the right to submit their own evidence on these matters, and would have the right to cross-examine the petitioner in an effort to demonstrate that its proposal to serve the specified community was either (1) not made in good faith (the charge made by Crawford against Tichenor in the Application), or (2) not capable of being effectuated for some reason (e.g., lack of financial resources). Apart from being a total departure from the current FM allocations system, such a procedure would raise the most serious administrative and policy concerns (not the least of which being First Amendment issues, and the Commission’s inability to predict with any degree

of confidence whether a petitioner would fulfill its future programming representations and, thereafter, whether and how the Commission might monitor such commitments.)

For these three reasons, the Commission should reject Crawford's attack on the Tuck test.

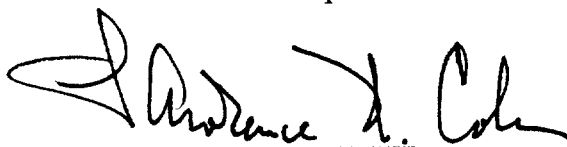
II. **The Commission Should Reject Crawford's Attack on Tichenor.**

Notwithstanding Crawford's use of the instant proceeding to attack the Commission's Tuck test (the motivation for which is apparent from the general style and tenor of the Application), Crawford's real complaint, presented in Section IV (and implicitly in Section I) of the Application, is that Tichenor submitted its proposal to change the community of license of Station KOBT from Winnie to Lumberton in bad faith. However, as the Media Bureau stated in its Order (see Paragraph 5), there is not one scintilla of evidence in the record which supports the claim that if Tichenor's counterproposal is approved it will fail to file an application to implement the change of Station KOBT's community of license from Winnie to Lumberton; moreover, Tichenor now hastens to add, there is not one scintilla of evidence in the record which supports Crawford's outrageous claim that, if Station KOBT's license is changed to specify Lumberton as its community of license, Tichenor will not fulfill its responsibilities vis-à-vis the station's new community of license. In sum, and as the Media Bureau expressly concluded in its Order, Crawford's contention that Tichenor submitted its counterproposal for Lumberton in bad faith is supported by nothing other than Crawford's gross speculation. Id. Such blatant speculation is not the stuff upon which the Commission makes its decisions.

For the foregoing reasons, the Commission should deny Crawford's Application for Review and should affirm the Media Bureau's Memorandum Opinion and Order, DA-04-3616 (released November 26, 2004).

Respectfully submitted

Tichenor License Corporation

A handwritten signature in black ink, appearing to read "Lawrence N. Cohn", written over a horizontal line.

Lawrence N. Cohn
Cohn and Marks LLP
1920 N Street, NW
Suite 300
Washington, DC 20036
Telephone: (202) 452-4817

Its Counsel

Date: January 4, 2005

Certificate of Service

I, Hannah Faye Jackson , an Administrative Assistant at the law firm of Cohn and Marks, LLP, hereby state that I have this 4th day of January, 2005, sent by United States mail, postage prepaid, a copy of the foregoing Opposition to Application for Review to the following:

Gene A. Bechtel, Esq.
Law Office of Gene Bechtel, P.C.
Suite 600
1050 17th Street, N.W.
Washington, D.C. 20036
Counsel for Charles Crawford



Hannah Faye Jackson